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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 204

WILLIAM HENRY HACKETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on May 25, 1962.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported; a copy of the opinion is printed in Appendix B, *infra* pages 23-25. There was no written opinion in the District Court for the Eastern District of Michigan, Southern Division.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 25, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are Title 21, U.S.C., Section 174, and Title 26, U.S.C. Section 4705(a), which are set forth completely in Appendix A, *infra* pages 21-22.

QUESTIONS INVOLVED

1. Were the Appellant's rights prejudiced by the rulings of the trial judge on the evidence respecting entrapment, and his refusal to direct a verdict of acquittal based on entrapment?

2. Should the trial court have required the Government agents to produce notes taken during an interview with the informer for an *in camera* inspection by the Court under the Jencks Act, or at least to account for their whereabouts?

3. Should the evidence seized from the Appellant at the time of his arrest have been suppressed as the fruit of an illegal search and seizure?

4. Did the trial court err in admitting an alleged confession of the Appellant without corroborating the fact that it was made, and when testimony of the Government witnesses indicated that inducements were given to the Appellant?

STATEMENT OF FACTS

On November 2, 1960, an indictment was returned in the District Court for the Eastern District of Michigan, charging the Appellant in five counts with violations of the federal narcotic laws, specifically 21 U.S.C. 174 and 26 U.S.C. 4705(a) (R. Appellant's Appendix 1a). The facts out of which this indictment arose are as follows:

The Government's special employee (informer) Clifton Watson was arrested for narcotics violations in March of 1960 (R. Appellant's Appendix 99a). At that time, after being promised that no publicity would ensue from his arrest if he cooperated, Watson agreed to assist the Federal Narcotics Bureau to capture other violators of the federal narcotic laws (R. Appellant's Appendix 99a). The Government did not specify any particular persons to work on (R. Appellee's Appendix 30b) but he understood his job to be that of going out and inducing whatever individuals he could to sell him narcotics (R. Appellant's Appendix 105a). On several occasions, he would be called down to the Narcotics Bureau and asked when he was going to come up with something (R. Appellant's Appendix 101a).

Clifton Watson had been a close friend of William Henry Hackett for a number of years. They visited at each other's homes, exchanged gifts, Watson would take out Hackett's children (R. Appellant's Appendix 102a, R. Appellee's Appendix 35b). On several occasions, if Hackett was in financial difficulty, Watson would loan him money to see his way out of it, even on one occasion pawning his own ring to help his friend (R. Appellee's Appendix 34b). Watson was aware of the fact that Hackett knew a source of narcotics because two years previously, when Watson was attempting to procure cocaine, Hackett introduced him to a source in another state, although Hackett himself never bought any narcotics when he would take Watson to visit these sources (R. Appellee's Appendix 47b, 48b). Sometime subsequent to March of 1960 and prior to August of 1960, Watson conceived of the idea that he may be able to induce Hackett to sell him narcotics, and thereby fulfill his obligation to the Federal Narcotics Bureau. Prior to that time, he had never purchased any narcotics from Hackett (R. Appellee's Appendix 50b). Although at first Watson testified that Hackett agreed to sell him narcotics the first time he approached him, (R. Appellee's Appendix 36b), he subsequently stated that he had been talking to Hackett for a period of two to three months before Hackett would agree to sell him narcotics (R. Appellee's Appendix 37b). He also testified that he told Hackett he was in financial difficulties because of losses in the numbers business and needed Hackett's help to get into the narcotics business so he could get back on his feet (R. Appellee's Appendix 37b).

When Watson was finally able to convince Hackett to sell him narcotics, the sale was set for August 18, 1960. At that time the narcotic agents were listening by a Fargo transmitter attached to Watson and a receiver in their

car outside. Watson was searched before he went into the house, and given the money to purchase the narcotics. After the sale was made, he was again searched, and relinquished the narcotics to the federal agents (R. Appellant's Appendix 72a-74a). After this sale was made, Watson again approached Hackett, and told him that he had been losing heavily at the racetrack, and again needed his help to get out of his financial difficulties (R. Appellee's Appendix 45b). Again Hackett yielded to his friend's entreaties, and the second sale was set for September 19, 1960. At this time, one of the narcotic agents hid in the closet of the bedroom where the sale was transacted, and the conversations were monitored by other agents with the use of the Fargo transmitter and receiver (R. Appellant's Appendix 65a-67a, 76a).

When the informer Watson testified that he had induced the Appellant Hackett to sell him narcotics (R. Appellant's Appendix, 105a), the prosecution then sought to introduce evidence of a prior conviction of the Appellant, nine years previously, and also prior contacts with narcotics two or three years previously, when he introduced Watson to a source (R. Appellant's Appendix 106a). The defense counsel objected strenuously to the introduction of this evidence at this stage of the proceedings, and the Court at that point questioned him as to whether or not entrapment was an issue in the case (R. Appellant's Appendix 167a). In response to the Court's question, the defendants' counsel answered that it was his position that the testimony of the witness Watson had established entrapment, and requested a ruling from the court as to whether entrapment had been established as a matter of law (R. Appellant's Appendix 107a). The court questioned the defense counsel as to whether the defendant was going to assert the defense of entrapment on several

occasions, each time receiving an affirmative answer, although they were given somewhat reluctantly.

The last count in the indictment, that of possession on October 6, 1960, arose from a search made of Hackett and his car at the time of his arrest on that date. The Appellant moved to suppress the evidence seized at that time, on the grounds that it was the fruit of an illegal search and seizure. On January 30, 1961, testimony was taken with respect to this motion (R. Appellant's Appendix 1a, 35a-46a, 4b-11b). Federal narcotic agent, Theodore L. Vernier testified that on October 4, 1960, Watson called him at home and told him that Hackett's car was at the Metropolitan Airport, and that he would be coming in with a supply of narcotics. He then testified that he arranged for immediate surveillance at the airport (R. Appellee's Appendix 4b, 6b, 9b). He recognized Hackett's car parked at the airport (R. Appellee's Appendix 5b, 6b, and 9b), and he arranged to have the car disabled so it could not be driven away (R. Appellant's Appendix 43a). No warrant was obtained for his arrest, and on October 6, two days after the information was allegedly received, Hackett was arrested at the Metropolitan Airport, and he and the car were again searched, and heroin was found in a paper bag concealed in a camera case found on the seat of the car. The trial judge, over defendant's objection, permitted the evidence to be received, stating that the officers had probable cause to arrest, and therefore the incidental search was legal (R. Appellant's Appendix 46a, 47a).

During the trial, each agent who testified was asked for the notes which they had made during their surveillance of the Appellant about which they had just previously testified, and each and every one of them testified that

they had destroyed them (R. Appellee's Appendix 12b, 17b, 19b and 23b). Also, Watson testified that some notes were made during an interview which he had with the narcotic agents, and when the Appellant called for production of said notes to the court, the Government said that no such notes were in existence (R. Appellee's Appendix 52b) and the court insisted that if the defense counsel could not show that these notes, which he had never seen, qualified as a statement under the Jencks Act, he would not compel production of them for an in camera inspection (R. Appellant's Appendix 167a).

Also during the trial, the Government produced the District Supervisor of the Federal Bureau of Narcotics, who testified that the Appellant had made an oral confession to him in his office subsequent to his arrest. The Appellant objected immediately to this testimony (R. Appellee's Appendix 61b). Prior to the trial the Appellant had made a demand pursuant to Rule 16, for all statements made by the Defendant, either oral, written, electronically or stenographically recorded (R. Appellant's Appendix 30a). He was informed at that time that there were no such statements. The testimony relative to the confession was taken in the absence of the jury, and it revealed that the Defendant had talked to the District Supervisor in his office, and had made a full confession orally to him, and had been promised that he would be charged under the "old law" which carried a lighter sentence and would be sent to a special prison if he "cooperated". The Appellant objected to the admission of this confession on the grounds of inducement by implied promises, and the court ruled that the question was one for the jury, and permitted the jury to hear the alleged confession (R. Appellant's Appendix 174a).

On February 16, 1961, the jury returned a verdict of guilty on all counts (Appellant's Appendix 2a). On March 22, 1961, after the filing of an information charging the appellant with a previous conviction (R. Appellant's Appendix 144a, 145a, 163a), a sentence of 15 years on each count, the sentences to run concurrently, was rendered (R. Appellant's Appendix 2a, 145a, 164a). The Appellant filed notice of appeal timely in the United States Court of Appeals for the Sixth Circuit, and on May 25, 1962, the Court of Appeals affirmed the decision of the trial court.

REASONS FOR GRANTING WRIT

During the prosecution's case in chief, the prosecutor was allowed to introduce evidence of the Defendant's prior conviction nine years previously, and was also permitted to introduce evidence which was not relevant to the crime charged but tended to show the commission of other crimes. The justification for permitting this highly prejudicial evidence to come in at that point was to enable the prosecution to rebut the defense of entrapment. This procedure was highly unfair to the appellant and placed him in a very precarious position. Entrapment as a defense to a criminal charge has long been recognized by this Court (See *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932). Resting as it does on fundamental principles of public policy, the defense of entrapment should not be so easily frustrated by the premature injection of such prejudicial evidence into the trial. If such evidence is to be admitted, the defendant should at least be given an opportunity to present his case for entrapment to the jury before they are prejudiced by this evidence showing a prior conviction.

The rule laid down by the Supreme Court in *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932), to the effect that evidence of prior disposition is relevant to negative the defense of entrapment has resulted in the defense of entrapment being one that has several inherent disadvantages. In *Coronado v. United States*, 266 F.2d 719 (5th Cir. 1959), where the defendant sought to introduce his testimony on entrapment in the absence of the jury, the Court refused to permit him to do so, saying that the defendant must make the choice as to whether to plead the defense of entrapment, weighing all the advantages and disadvantages. In the instant case, although the trial judge refused to permit the defendant to introduce evidence of entrapment in the absence of the jury, he also took the choice of pleading the defense away from him. He questioned the defendant's attorney as to whether or not he was going to plead entrapment. It is clear that had the defense counsel denied at that time that he would use the defense of entrapment, when he finally had an opportunity to weigh the relative advantages and disadvantages, he would have been estopped to plead it then. Therefore, having gained an admission from defense counsel that entrapment would be part and parcel of his defense, the Court then declared that all this evidence was relevant to rebut the defense of entrapment, which at that point in the trial had not yet been affirmatively raised. The trial court's action in permitting the prosecution to introduce this evidence in its case in chief in essence gives the prosecution the ultimate choice as to whether or not the defendant will plead entrapment. If the prosecutor wishes to introduce evidence of the defendant's past record, he is no longer barred by the long-standing rule against this procedure. The de-

fendant who has been in trouble before then becomes a wide open defenseless target for the ruthless tactics of the prosecutor to get before the jury his entire background, from which there will never again be any escape. The jury, hearing that the defendant has committed crime before, is no longer sympathetic toward him. For all practical purposes, the time-honored presumption of innocence is trampled under the barrage of insinuations and inferences rushing from this extremely prejudicial, although irrelevant, evidence, and the man is again sent to prison, a victim of his past. To permit this type of evidence to be introduced during the prosecution's case in chief will deaden the jury's ear to anything the defendant could attempt to prove respecting entrapment, whether the prior conviction showed a predisposition or not.

Although the introduction of the evidence of the defendant's character and past record in the prosecution's case in chief represents a serious deterioration of the principles underlying our whole system of criminal jurisprudence and administration, this problem is merely a symptom of a much broader and more destructive practice. This is the practice of admitting this evidence in at all, regardless of at what stage of the proceedings it is admitted. Members of this Court have recognized the danger involved in permitting this type of evidence to be used to refute the defense of entrapment. Mr. Justice Frankfurter, in his concurring opinion in *Sherman v. United States*, 356 U.S. 369, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958), in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Harlan joined, unequivocally condemned the practice of admitting this type of evidence. He says (at page 383):

> "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, cer-

> tain police conduct to ensnare him into further crime is not to be tolerated by an advanced society * * * Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time and in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities. *Appeals to sympathy, friendship*, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than when directed against a law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes, anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view."

Justice Roberts, Justice Brandeis, and Justice Stone, in the concurring opinion in *Sorrells v. United States*, supra, also expressed the same view.

The character and predisposition of the defendant can be extremely prejudicial to the defense of entrapment. Since the defense of entrapment is predicated on the idea that the police should not be permitted to use unfair tactics, a test which looks to the character and disposition of the defendant loses sight of the underlying reason for the

defense. Whatever may be the demerits of the defendant or his previous infractions of the law, this will not justify the instigation of a new crime as a means of punishing him for his past single and isolated mistake. Therefore, this Court should take this opportunity to reconsider its decision in the *Sorrells* case, in the light of the effect which it has had on the availability of the defense of entrapment to those who have committed crime before.

Furthermore, the defense of entrapment, being essentially a public policy defense, should be considered and decided by the court and not by the jury. When a question of illegal search and seizure is raised, the issue is never submitted to the jury to determine whether there was probable cause for the search. Since the same policy is at stake in questions of entrapment, there is no reason to submit this issue to the jury. As Justice Frankfurter, in his concurring opinion in *Sherman v. United States*, supra, said (at page 381):

> "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

It is the obligation of the court to protect themselves as instruments in the administration of criminal justice, from being used as instruments of oppression and injustice. The difficulties which may inhere in the decision of this issue do not justify the delegation of this important obligation to the jury. Justice Roberts made this point very definitely in *Sorrells v. United States*, 287 U.S. 435, 457, 77 L. Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932), when he said:

> "The protection of its own functions and the preservation of the purity of its own temple belongs

> only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention."

This Court should consider the opinion of Mr. Justice Roberts in *Sorrells v. United States*, supra, and Mr. Justice Frankfurter, in *Sherman v. United States*, supra, in the light of the policy decisions underlying the defense and reconsider the earlier opinions of *Sherman v. United States*, supra and *Sorrells v. United States*, supra, insofar as they indicate that the determination of whether or not there was entrapment is a question for the jury.

2. On cross-examination, each agent for the Federal Bureau of Narcotics indicated that he had destroyed the notes which he had made when he was monitoring the transactions between Watson and Hackett. If these notes had been in existence the Defendant would have been entitled to them under the Jencks Act (18 U.S.C. 3500). This is exactly what Mr. Justice Brennan, in his concurring opinion in *Palermo v. United States*, 360 U.S. 343, 354, 355, 3 L.Ed. 2d 1287, 79 S.Ct. 1217 (1959) predicted could happen under this Act. Unless some method is devised by which destruction of the relevant notes may be prevented, such as was done by excluding the evidence before the Jencks Act was enacted, then the agents can always prevent the defendant from compelling the production of the statements of witnesses, or notes that he has made, by destroying the original notes and recompiling them sometime later, so that they will not qualify under the "contemporaneous" requirement of the Jencks Act. This will

completely frustrate the policy of the Supreme Court regarding criminal discovery as expressed in *Jencks v. United States*, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 (1957), and later reaffirmed in *Campbell v. United States*, 365 U.S. 85, 5 L.Ed.2d 574, 81 S.Ct. 421 (1961). This Court should take this opportunity to correct this flagrant, but apparently customary, frustration of the intent and purpose of the Jencks Act.

Furthermore, Watson, on cross-examination testified that the agents made notes during one of the interviews they had with him. The Government insisted that these notes did not qualify under the Jencks Act, and the Court told the defense counsel that unless he could prove to the court that these notes qualified as statements under the Jencks Act, he would not order the Government to produce them. This action is in express contradiction to the Jencks Act, and the decisions of this Court construing it. Mr. Justice Brennan, in his concurring opinion in *Palermo v. United States*, supra, which was joined in by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas, stated the proposition very emphatically:

> "The responsibility of the federal trial judge, it goes without saying, is not to be delegated to the prosecutor. Questions of production of statements are not to be solved through one party's determination that interview reports fall without the statute, and hence that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage. I am confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral determination of the prosecuting arm of the Government."

It is apparent from the instant case that federal trial judges have not devised procedural methods to insure that

the responsibility of the trial judge is not abdicated in favor of the prosecutor. Because the defense counsel had never seen the notes, he could not determine whether they were substantially verbatim. He knew from the testimony of the witness that they were made contemporaneously, but it is the witness he is seeking to impeach, and he cannot discover from the witness in the presence of the jury, what was in the statement, so he can see if he can prove to the judge that it ought to be produced to the judge to determine if it complies. It is the judge's responsibility to find out if the statement complies with the Jencks Act, not the defense counsel's. Therefore, this Court should prescribe some rules for the guidance of the trial courts in applying this Act, at least insofar as when production for an in camera inspection should be required.

3. As respects the last count of the indictment, the defendant moved to suppress the evidence found in the camera case on the grounds that it was illegally seized. The testimony of the federal agents was to the effect that their reliable informer had told them that Hackett was coming in on a plane with some narcotics. This statement was contradicted at the trial by the informer who asserted that he had never told the federal agents anything about Hackett coming in at Metropolitan Airport because he didn't know anything about it. This situation presents a very difficult question as to when the reliability of the informer, and the fact that he gave the agents the information must be established. Because of the rulings of this Court in *Draper v. United States*, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959) the federal agents seeking a search warrant, have asserted that they have acted on probable cause based on information received from a reliable informer. In the *Draper* case, it was clear that the informer was reliable. Here, where he is still awaiting trial on a

charge, and is at the mercy of the Government, the informer, when asked about this information, in open court asserted that he had not told the agents this. It appears that at least the informer should have been produced at the hearing on the motion to suppress the evidence, since the entire issue there was his reliability. This Court should define the scope of the *Draper* case in order that defendants, when confronted with this problem, can make a decision as to which course of action to take. For in this case, the defendant moved to suppress the evidence, the informer was not produced, and based on the evidence before him, the magistrate ruled that there was probable cause. At the trial, when it appeared that the search did not rest on reliable information from an informer at all, the court held that defense counsel was estopped to go into the issue at all, since he had raised it on a preliminary motion. This type of practice seems to be entirely inconsistent with the Fourth Amendment to the United States Constitution, and does not appear to be the intention of this Court when it decided *Draper v. United States.*

Furthermore, the information that the agents received, if it is assumed for the sake of argument that they did receive it, was received two days before the defendant was arrested. The car of the defendant was kept under constant surveillance, and was even disabled, so there was no opportunity for the defendant to escape. Therefore, there is no reason for the narcotics agents to have failed to obtain a warrant, and their failure to do so is also inconsistent with the Fourth Amendment and the decisions of this court in *Chapman v. United States,* 365 U.S. 312, 5 L.Ed.2d 828, 81 S.Ct. 776 (1961); *Johnson v. United States,* 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1947), and *Henry v. United States,* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1960). Therefore, this Court should correct

this error and define how far the motor vehicle exception, contained in *Carroll v. United States*, 267 U.S. 132, applies.

4. During the course of the trial, the Government sought to introduce evidence to the effect that the Defendant had made an oral confession to the District Supervisor of the Narcotics Bureau. There was no other evidence of the fact that a confession had been made other than that of an interested party, the District Supervisor, with no witnesses. Furthermore, prior to trial, the defendant moved for discovery of all the statements made by the Defendant under Rule 16 and Rule 6(a) of the Federal Rules of Criminal Procedure. The United States Attorney at that time informed the court that no such statements were made, and then when it appeared in the trial that a confession was necessary to sew up the case, the District Supervisor remembered an oral confession that the defendant had made to him. Because of the damaging effect of a confession, more should be required to show that one was in fact made than the unsupported testimony of an interested party. This point has never been considered by this Court. In *Smith v. United States*, 348 U.S. 147, 153, 75 S.Ct. 194, 99 L.Ed. 192 (1954), this Court decided that the truth of the matters contained in the confession would have to be corroborated. It is equally important to the rights of the defendant that the fact that he made an oral confession be corroborated, since he has no recourse to disprove it, except by a denial, which by then will sound very weak. The opportunities for unfairness to the defendant when dealing with oral confessions is manifold, and this Court should deal with the problem in such a way that there will be no question that the confession was in fact made.

Furthermore, the District Supervisor testified that certain inducements in the form of promises of easier treatment were given to Hackett. Specifically he was told that if he "cooperated" he would be charged under the "old law" which carries a lighter penalty, and would be able to get out on a personal bond. He actually was let out on a small bond until he indicated that he was going to defend himself. There is a question as to when these inducements were given to him. The District Supervisor indicated that they were given to him after he confessed, to induce him to entrap other individuals. Other testimony indicated that the agents had already determined his willingness to cooperate, before he ever talked to the District Supervisor. In *Crawford v. United States*, 219 F.2d 207 (5th Cir. 1955), rehearing denied 220 F.2d 352 (5th Cir. 1955), this exact situation was presented to the Fifth Circuit Court of Appeals, and it held that the confession was involuntary. This Court should consider this problem to determine to what extent offers made by the Narcotics Bureau for leniency when the defendant cooperates to entrap other individuals will render a confession involuntary.

Furthermore, permitting the jury to decide the issue is depriving the judge of a function which he had at common law. *At common law, it was the orthodox rule that* the judge was to determine the issue of voluntariness. Submission of the issue to the jury distorts the functions of the judge and jury as they were known at common law, and therefore operates to deprive the defendant of his right to trial by jury as it was known at common law and guaranteed by the Sixth Amendment. (See *Herron v. Southern Pacific R. R. Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1930). In *Stein v. New York*, 346 U.S. 156, this Court indicated that it was not a denial of due process of law for the state court to submit the issue to a jury, but

indicated that the rule would have been different if the case had arisen in a federal court. This Court should take the opportunity presented in this case to clarify this statement insofar as it relates to the federal court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated this 21st day of June, A. D., 1962,
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APPENDIX A

STATUTES INVOLVED

21 U.S.C. Section 174. Penalty—Evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug in to the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954 [26 §7237(c)]), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954 [26 §7237].

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, c. 100, §2 * * *.

* * * * *

26 U.S.C. Section 4705. Order Forms.

(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

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APPENDIX B

OPINION

No. 14634

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee,* v. William Henry Hackett, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided May 25, 1962.

Before Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

PER CURIAM. This is an appeal from a jury verdict finding the appellant guilty on all five counts of an indictment charging unlawful possession and sale of heroin. Title 21, U. S. C. A., Sec. 174; Title 26, U. S. C. A., Sec. 4705(a). Following the conviction and the prosecution of an information pursuant to Title 26, U. S. C. A., Sec. 7237, charging the defendant with a prior narcotics conviction the trial court imposed sentences of fifteen years on each of the five counts, the sentences to run concurrently.

The defendant did not testify in his own behalf nor did he tender other witnesses in the district court trial. He contends broadly on this appeal he was entitled to a verdict

of acquittal by the trial judge on the grounds of entrapment and that the trial judge erred in not directing such verdict on this ground as a matter of law. Though this insistence would seem to have no application with respect to count five of the indictment, the basis for the defendant's position concerning entrapment is that the government agents working through an informer, Clifton Watson, arranged with Watson for two purchases of heroin from the defendant. The trial judge ruled the question of entrapment was for the jury and he quite adequately instructed the jury in this connection. There was no exception to his charge. In our view the submission of this issue to the jury was proper and there was ample evidence from which the jury could reasonably find the defendant was not a victim of entrapment on the part of the government's agents. *Sorrells v. United States*, 287 U. S. 435 (1932); *Sherman v. United States*, 356 U. S. 369 (1958); *Masciales v. United States*, 356 U. S. 386 (1958); *Morales v. United States*, 260 F. 2, 939, C. A. 6 (1958).

The defendant raises questions under the Jenks Act (Title 18 U. S. C. A., Sec. 3500) relative to the production of notes and statements made by various government agents in the questioning of witnesses during the investigation of this case. The district judge in our opinion handled this phase of the trial properly and with much care. The defendants' rights were adequately protected in this regard, and there is no merit in this assignment by the defendant.

The defendant regarding count five of indictment takes exception to the trial court's denial of the defendant's motion to suppress the evidence which was seized without a search warrant at the time of the defendant's arrest. We find no support in the record for the assignment in this connection. There was in our opinion probable cause for the agents to believe that the defendant at the time of his arrest was committing an offense under the narcotic laws of the United States. Title 26 U. S. C. A., Sec. 7607; *Draper v. United States*, 358 U. S. 307 (1959).

Another issue on this appeal is whether the trial court erred in receiving in evidence certain statements made by the defendant to the government agents herein more than a week following his arrest while at liberty on bond. The defendant claims admissions at that time were made only after inducements through promises of reward by the government agents. The trial judge following the usual practice, first considered and passed upon this matter out of the jury's presence. It was then inquired into in the jury's presence, and the question was submitted to the jury under proper instructions. *United States v. Carignan*, 342 U. S., 36 (1951); *Lyons v. Oklahoma*, 322 U. S. 596 (1944). The complaint in this regard is not well founded.

JUDGMENT

Other questions raised by the defendant have been considered in the light of the briefs, arguments of counsel and the entire record and are found to be without merit. There being no reversible error, the judgment of the district court is affirmed.